IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 501 of 2005

Assisi Co-operative Housing Society
Limited & ors. .. Petitioners

versus

The State of Maharashtra & ors. .. Respondents

...

Mr.Shishir Joshi for the petitioner.
Mr.Appasaheb Desai a/w R.S. Ghadge for respondent no.5.
Mr.Milind More, AGP for respondent nos.1 to 4.

CORAM : D.G. KARNIK, J

DATED : 6th July 2006.

ORAL JUDGEMENT :-

1. By this petition, the petitioners challenge the order dated 9th February 2005 passed by Government on revision application filed by the respondent no.4 holding that the petitioner nos.2 to 7 had ceased to

be the members of the managing committee (for short 'the committee')of the petitioner no.1 society by virtue of sub-section (1AB) of section 73 of the Maharshtra Co-operative Societies Act,1961 (for short 'the Act')

2. The petitioner no.1 is a Co-operative Housing Society, registered under the Act. Elections to the committee of the petitioner no.1 society were held in October/November 2002, in which the petitioners 2 to 7 were elected as members of the committee. The managing committee took charge on 3rd November 2002. Under sub-section (1AB) of section 73 of the Act, as introduced by Maharashtra Act no.41 of 2000, each member of the committee of the society is required to execute a bond in the prescribed form within a period of 15 days of his assuming office failing which he is deemed to have vacated the office as a member of the committee. Petitioner nos.2 to 7 were required to execute the relevant bond in the prescribed form within a period of 15 days from assuming their office. i.e. on or before 15th November, 2002. Petitioners 2 to 7 did not execute the necessary bond within the statutory period of 15 days which led to a complaint filed by the respondent no.5 to the Dy. Registrar

Co-op Society. Thereupon, the Dy. Registrar issued a show cause notice dated 24th June 2003 to the petitioners directing them to show cause why they should not be deemed to have vacated the office under sub-section (1AB) of section 73 of the Act and why an action under section 78(2) of the Act be not taken against them for their removal. The show cause notice was received by the petitioners on 17th July 2003. After receipt of the show cause notice, the petitioners sought adjournment of the hearing and before the adjourned date, they executed the bonds in the prescribed form on 19th August 2003. The bonds were then filed with the Dy. Registrar by petitioners under cover of their letter dated 24th August 2003. After hearing the parties, the Dy.Registrar held that the petitioners had not submitted the bonds within the statutory period of 15 days as required by sub-section (1AB) of section 73 of the Act. He therefore held that the petitioners 2 to 7 were deemed to have vacated the office as the members of the committee. He further held that as petitioners 2 to 7 were the only members of the managing committee and as there was no other member of the committee left, it was necessary to appoint an administrator. Accordingly, he passed an order u/s.78 of the Act superseding the

committee and appointing Mr.B.K. Mokle, Assistant Co-operative Officer as an administrator for a period of six months. The administrator was directed to hold fresh elections within six months and transfer the management of the petitioner no.1 society to the newly elected committee.

3. Aggrieved by the order of the Dy.Registrar the petitioners filed an appeal (bearing no.194 of 2003) before the Divisional Joint Registrar who, by his order dated 27th February 2004, allowed the appeal and set aside the order of the District Dy. Registrar. Aggrieved respondent no.5 carried the matter in revision u/s.154 of the Act before the Government. By the order dated 9th February 2005, the Government allowed the revision application and set aside the order dated 17th February 2004 passed by Divisional Joint Registrar and restored the order dated 25th August 2003 passed by Dist. Dy. Registrar. That order is impugned in this petition.

4. Counsel for the petitioners submitted that sub section (1AB) of section 73 of the Act must be held to be directory. Though it requires every elected member of the managing committee of the

society to execute a bond in the prescribed form within a period of 15 days of his assuming office, the court must look to the object thereof. The bond is required to be executed only to fix the liability in the event by actions of the committee any loss is suffered by the society. The statement of objects and reasons of Maharashtra Act no.41 of 2000 by which sub-section (1AB) was introduced in section 73 states that execution of the bond by the members of the managing committee is made mandatory so that the committee conducts the business of the society with due care and more responsibility. Taking into consideration the object of the amendment requirement of execution of the bond within a period of 15 days from the date of assuming of the office must be held to be directory and not mandatory. Even if there was some delay in execution of the bond such delay can, in appropriate cases, be condoned and a member of the committee should not be held to have vacated the office and an order u/s.78 for his removal should not be passed. Counsel for the petitioner relied upon two attention to the decisions of Division Benches of this Court in Keshaorao Narayanrao Patil Vs. District Deputy Registrar reported in 1987 Mh.L.J. 709 and Kerbaji Marotirao Shinde Vs. State of Maharashtra

reported in 1988 Mh.L.J. 157, and of a Single Bench in Sureshchandra Agarwal Vs. Dy. Joint Registrar (Writ Petition no.373/06) decided on 6th March 2006 (Coram S.U. Kamdar, J) in support of his submissions.

5. Per Contra, Counsel for the respondent 5 submitted that provisions of sub-section (1AB) of section 73 of the Act were mandatory. Sub-sec.(1AB) provides that each member of the committee shall be jointly and severally responsible for all the decisions taken by the committee and shall be jointly and severally responsible of all acts and omissions detrimental to the interest of the society. Sub-section (1AB) further requires every member of the committee to execute a bond to that effect within the period of 15 days of his assuming the office and provides that any member of the committee who fails to execute such bond within the specified period shall be deemed to have vacated his office as a member of the committee. Counsel submitted that sub-section (1AB) not only requires every member of the committee to execute the bond in the prescribed form within 15 days of assuming the office but also prescribes consequences of non execution of the bond within the stipulated period, viz. the member who fails to

execute the bond shall be deemed to have vacated the office. Since the consequences for the breach have been provided for, the provision must be held to be mandatory and the consequences statutorily prescribed must follow. He further submitted that there is no provision in the Act to condone the delay in executing the bond and the effect provided in the section for not furnishing of the bond within 15 days must take place without any exception. He submitted that in the present case as the petitioners 2 to 7 had not executed the bond within the stipulated period of 15 days, they were deemed to have vacated the office and therefore, the order passed by the Dy. Registrar was proper and legal.

6. In order to appreciate the rival contentions of the parties, it would be appropriate to reproduce below sub-section (1AB) of section 73 of the Act which reads as follows:

> 73: (1AB) The members of the committee shall be jointly and severally responsible for all the decisions taken by the committee during its term relating to the business of the society. The members of the committee shall be jointly and severally responsible for all the acts and omissions detrimental to the interest of the society. Every such

member shall execute a bond to the effect within fifteen days of his assuming the office, in the form as specified by the State Government by general or special order. The member who fails to execute such bond within the specified period shall be deemed to have vacated his office as a member of the Committee:

. Provided that, before fixing any responsibility mentioned above, the Registrar shall inspect the record of the society and decide as to whether the losses incurred by the society are on account of acts or omissions on the part of the members of the committee or on account of any natural calamities, accident or any circumstances beyond the control of such members:

. Provided further that, any member of the committee, who does not agree with any of the resolution or decision of the committee, may express his dissenting opinion which shall be recorded in the proceedings of the meeting and such member shall not be held responsible for the decision embodied in the said resolution or such acts or omissions committed by the committee of that society as per the said resolution. Such dissenting member, if he so desires, may also communicate in writing his dissenting note to the Registrar within seven days from the date of the said resolution or decision. Any member, who is not present for the meeting in which the business of the society is transacted, and who has no subsequently confirmed the proceedings of that meeting, such member shall also not be held responsible for any of the business transacted in that meeting of the society.

7. Sub-section (1AB), consists of two parts. The first part lays down that the members of the committee

shall be jointly and severally responsible for all decisions taken by the committee during its term relating to the business of the society and that members of the committee shall be jointly and severally responsible for all acts and omissions detrimental to the interest of the society. Proviso to sub-section (1AB) requires the Registrar to inspect the records of the society and decide whether any losses incurred by the Society are on account of the acts or omissions on the part of the members of the committee or on account of any other cause such as natural calamities, accident or any circumstances beyond the control of the members of the committee. Second proviso to sub section (1AB) says that where any member of the committee expresses his dissenting opinion to any resolution or decision of the committee the dissent shall be recorded in the proceedings of the meeting and such member would not be responsible for the decision embodied in the said resolution. So also any member of the committee who is not present for the meeting in which the business of the Society is transacted and who has not subsequently confirmed the proceedings of that meeting would not be held responsible for the business transacted in that meeting of the society. Thus, the two provisos are

exception to the principle of joint and several liability of the members of the committee for their acts and omissions. If the circumstances covered by the provisos exists, the member or the members of the committee may escape the liability for their acts and omissions. Second part of Sub-section (1AB) provides that every member of the committee shall execute a bond in the prescribed form, regarding his liability for the loss caused to the society by his acts and omissions, within 15 days of his assuming the office. Joint and several liability of every member of the committee for the actions of the committee arises statutorily out of the first part of sub-section (1AB) of section 73 of the Act. However, in order to leave no doubt, the legislature has introduced further provision requiring every member of the committee to execute the bond regarding his joint and several liability. The legislature has further provided that a member of the committee who fails to execute the bond within the specified period shall be deemed to have vacated his office as a member of the committee. Vacation of the office is automatic and the statutory consequence of non execution of the bond within 15 days of assuming the office. Sub-section (1AB) of section 73 of the Act does not make any exception to

the vacating of the office on non execution of the bond within 15 days. There is no provision for extension of time for execution of the bond. Even if there is just and sufficient cause for non execution of the bond within 15 days, the statute does not give power to the Registrar to extend the period for execution of the bond beyond the statutory period of 15 days. The provision may appear drachonic but if the legislature, in its wisdom, has chosen to enact and provide for automatic vacation of the office without any power to grant extension of time with a view to check the malpractices committed by the members of the committee of a society, the Court cannot refuse to give full effect to it. It is for the legislature to amend the law, if it so thinks necessary to grant any suitable relief in appropriate cases by extension of time for execution of the bond. If the language of the statute is clear, the Court cannot refuse to enforce it on the ground that the enforcement would cause hardship.

8. Counsel for the petitioner,however, strongly relied upon the decision of a Division Bench of this Court in Keshaorao Patil Vs. District Dy. Registrar (Supra). While interpreting section 73FF of the Act

which prescribes disqualifications for being a member of a committee of a society, the Division Bench held that even if a person is disqualified from being a member of the committee of a society, he would not cease to be a member automatically but passing of an order u/s.78 of the Act for his removal was necessary. Counsel therefore submitted that merely because the petitioners 2 to 7 had not executed the bond, they could not automatically be disqualified and it was necessary to pass an order u/s.78 for their removal. In Pundalik Kadhav Vs. District Deputy Registrar, reported in 1991 C.T.J. 577, the Supreme Court in paragraph no.13 of its judgement observed :

> "In Keshaorao Narayanrao Patil V. District Deputy Registrar (reported in 1987 Maharashtra Law Journal 709) Bombay High Court held that Section 73FF (2) did not operate automatically and that passing of an order of removal was necessary. This has to be interpreted in the context of the provisions in the Section."

The Supreme Court has thus clearly laid down that the decision of the Division Bench in Keshaorao Patil's case has to be interpreted in its context. In any event, I fail to see how the decision in Kesharao Patil's case furthers the case of the petitioners. All that was laid down by the Division Bench in that

case was that incurring of a disqualification of section 73FF would not amount to automatic cessation of the office as a member of the committee but for such cessation an order u/s.78 was necessary. In the present case, the Dy. Registrar issued a specific show cause notice to the petitioners why action under section 78(1) be not taken against them for breach of section 73(1AB) of the Act. After hearing the petitioners, Dy.Registrar passed an order holding that petitioners 2 to 7 had ceased to be the members of the managing committee. The order specifically states that the order was passed in pursuance of the powers conferred u/s.78(1) of the Act. Thus, in the present case, the petitioners 2 to 7 were removed by an order passed under section 78(1) of the Act. The decision therefore does not help the petitioners at all.

9. Counsel for the petitioner also relied upon another decision of a Division Bench in Kerbaji Maroti Rao Shinde Vs. State of Maharashtra & ors. reported in 1988 Mh.L.J. 157 in which it was held that unless an action u/s.78 of the Act was taken, a person cannot cease to be a member of the managing committee even if he was disqualified u/s.58 of the

Act. This decision also does not further the case of the petitioner in the present case an order was passed by the Dy. Registrar u/s.78 of the Act.

10. In Sureshchandra Agarwal Vs. Dy. Joint Registrar (Supra) a Single judge of this Court held that opening of a bank account without obtaining the prior permission of the Registrar under clause (d) of section 70 or the appointment of the same auditor continuously for auditing the account etc. were not the lapses of such a grievous nature as would justify action u/s.78(1) of the Act. No doubt therein reference has also been made to not executing a bond within 15 days as prescribed under the provisions of the Act. However, from the short judgement which is of only two paragraphs, it is not clear what bond is referred to therein and whether the bond was the one which is referred to in sub-section (1AB) of section 73 of the Act. Therefore, it cannot be said that the decision lays down a law that non execution of the bond required under sub-section (1AB) of section 73 of the Act would not empower the Registrar to pass an order of removal of the member and further to pass an order of supersession of the committee u/s.78 where all members stood removed by reason of non-execution

of the bond. There is a clear provision under sub-section (1AB) of section 73 that a committee member who fails to execute a bond within the specified period shall be deemed to have vacated his office as the member. This part of the provision was not brought to the notice of the learned Single Judge and has not been considered in the decision. Assuming, therefore, that the bond therein related to the bond referred to in sub-section (1AB) of section 73, the judgement is per incurium as the sub-section (1AB) of section 73 of the Act which provides that the member shall be deemed to have vacated the office was not brought to the notice of the Court.

11. Counsel for the respondent rightly referred to and relied upon the decision of a Division Bench of this Court in Pundlik Kadhav Vs. District Dy. Registrar reported in 1990 Mh.L.J. 925. The petitioner therein was elected as member of the committee of the Co-operative Housing Society in the election held on 18th August 1986. On that day, he was a defaulter in payment of a loan to a co-operative bank. He repaid the loan on 21st October 1986. It was held that on the date when he was elected, he was disqualified to be a member and

his subsequent payment of the loan would not cure the disqualification and his election as a member of the committee was illegal. This decision has been confirmed by the Supreme Court in Pundlik Vs. District Dy. Registrar reported in 1991 CTJ 577. In the present case petitioners became disqualified and ceased to hold office on 18th November 2000 on expiry of statutory period of 15 days for executing the bond. The fact that after the expiry of the statutory period of 15 days, the petitioners 2 to 7 executed the bond would not save them from removal of the office which they are deemed to have vacated on expiry of 15 days from the date of their assuming of the office. A show cause notice was issued to the petitioners and was received by them on 17th July 2003. Even within the period of 15 days of the receipt of show cause notice, they did not execute the bond but executed the bond on 19th August 2003 and submitted the same to the Registrar under cover of the letter dated 24th August 2003. The office which is deemed to have been vacated by the petitioners on 19th November 2002, therefore, cannot be restored on their execution of the bond on 19th August 2003.

12. For these reasons, there is no merit in the petition which is hereby dismissed. In the facts and circumstances of the case, parties shall bear and pay their own costs.

D.G. KARNIK, J